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CPLR 203(b)(5): Interposition of a Claim by Filing Summons with Court Clerk Held to Be Equivalent to Commencement of Action

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judgment. In *People v. Cepeda*, the Appellate Division, First Department, has answered some of the questions posed by the Court of Appeals decision in *People v. Brown* which changed New York law by sanctioning the admission of exculpatory declaration against penal interest testimony at a criminal trial. It remained unclear whether a declaration against penal interest by a third person would be admissible to inculcate a defendant. The first department in *Cepeda* seems to have settled the issue by holding that a declaration against penal interest made by an unapprehended accomplice is inadmissible to incriminate the defendant in a criminal trial.

These decisions, as well as others reported in this final issue of volume 52, have been chosen to effectuate the primary purpose of *The Survey*: to keep the practitioner abreast of recent developments in New York practice. It is hoped that these brief commentaries will alert the attorney to significant trends and may thereby be of assistance to him in practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 203(b)(5): Interposition of a claim by filing summons with court clerk held to be equivalent to commencement of action

CPLR 203 provides that the timeliness of an action is determined as of the date of which a plaintiff *interposes* his claim.¹ Under subsection (b)(5) of the statute, a claim may be interposed by filing a summons with a court clerk, provided that the defendant is personally served "within sixty days after the period of limitation would have [otherwise] expired."² The language of section 203(b)(5) would appear simply to provide a plaintiff with an additional 60 days to *commence* his action.³ Read in that way, the stat-

¹ CPLR 203(a) provides that "[t]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."

² CPLR 203(b)(5) states in part:

(b) A claim asserted in the complaint is interposed against the defendant . . . when:

. . . .

5. . . . the action to be commenced will be tried in a court located within the city of New York, the summons is filed with the clerk of the court in the county within the city of New York where the defendant resides, is employed or is doing business, . . . if the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision

The effect of filing with the clerk is to extend the applicable statute of limitations by 60 days. See CPLR 203(b)(5), commentary at 117 (McKinney 1972).

³ See *Oliver v. Basle*, 55 App. Div. 2d 975, 390 N.Y.S.2d 466 (3d Dep't 1977) (mem.); *Rossi v. Oristian*, 50 App. Div. 2d 44, 376 N.Y.S.2d 295 (4th Dep't 1975). Although the *Oliver* court dismissed the plaintiff's complaint on the grounds that timely service had not been

ute does not conflict with the general rule that an action is commenced by service on the defendant.⁴ Some courts, however, have equated the interposition of a claim and the commencement of an action.⁵ In most cases the determination whether the statute of limitation has run will not be altered if the two terms are used interchangeably since interposition and commencement usually occur simultaneously.⁶ Recently, however, in *Cheselka v. Eastern Air Lines, Inc.*,⁷ the Supreme Court, New York County, was presented with a situation where the distinction was critical and held that filing with a clerk is equivalent to commencing an action.⁸

On September 17, 1976, while an employee of Eastern Air Lines, Stephen Cheselka was demoted from inflight services supervisor to flight attendant.⁹ Alleging that the demotion was prompted by his age, Cheselka filed a complaint with the New York State Division of Human Rights (SDHR) pursuant to section 297 of the Human Rights Law.¹⁰ On September 15, 1977, the plaintiff re-

made upon the defendant, the court nevertheless recognized that "delivering the summons to the Sheriff extended plaintiff's time to serve defendants 60 days, [with] the statute clearly [making] the extension conditional on effecting service of the summons on defendants within the 60-day period." 55 App. Div. 2d at 976, 390 N.Y.S.2d at 466.

⁴ See CPLR 304 and note 5 *infra*.

⁵ See, e.g., *Clough v. Board of Educ.*, 56 App. Div. 2d 233, 392 N.Y.S.2d 170 (4th Dep't 1977); note 23 and accompanying text *infra*. The proposition that an action is commenced upon the filing of a summons with the court clerk is in marked contrast to CPLR 304, which states that "[a]n action is commenced and jurisdiction acquired by service of a summons."

While courts have recognized that certain extraordinary circumstances may necessitate relaxation of the requirement of service of process, it is accepted that the instances of dispensation with the requisite service should be kept at a minimum. See *Schram v. Keane*, 279 N.Y. 227, 18 N.E.2d 136 (1938), in which the Court of Appeals noted the law's recognition that at times it may be difficult to serve a summons and that before there can be an adjudication of the controversy, and even before a summons is served, the court must take jurisdiction of an action for the purpose of granting an order of arrest, injunction or attachment as a temporary or provisional remedy for an alleged wrong.

Id. at 233, 18 N.E.2d at 138-39.

The recognized need for judicial power to grant some provisional remedy when there is a substantial danger of further damage to an aggrieved party, prior to service of process upon a defendant, was inapplicable to the facts present in *Cheselka*.

⁶ See note 25 and accompanying text *infra*.

⁷ 93 Misc. 2d 219, 402 N.Y.S.2d 159 (Sup. Ct. N.Y. County 1978).

⁸ *Id.* at 222, 402 N.Y.S.2d at 161.

⁹ *Id.* at 220, 402 N.Y.S.2d at 160.

¹⁰ *Id.* The Human Rights Law is set forth in Article 15 of the Executive Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 1972 & Supp. 1977). The plaintiff in *Cheselka* predicated his cause of action on § 296(1)(a) of the Human Rights Law which states that it is an unlawful discriminatory practice

[f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discrimi-

quested that his complaint be withdrawn as of that date so that he could commence a court action. On the same day, the plaintiff filed a summons with the court clerk pursuant to CPLR 203(b)(5).¹¹ The SDHR proceeding was dismissed as of September 29, 1977,¹² and the defendant was served with a summons and complaint on October 31, 1977.¹³

At trial, the defendant moved to dismiss the complaint, claiming that the action had not been timely commenced.¹⁴ The defen-

nate against such individual in compensation or in terms, conditions or privileges of employment.

Id. § 296(1)(a) (McKinney Supp. 1977).

¹¹ 93 Misc. 2d at 220, 402 N.Y.S.2d at 160. Once a complaint has been filed with the SDHR, the administrative proceeding, while pending, is the exclusive remedy available to an aggrieved party. *See* notes 19-20 *infra*. There exists no bar to a subsequent court action if the SDHR proceeding is dismissed for administrative convenience. The provisions of § 297(9), however, which provide that in such a case an individual "maintain[s] all rights to bring suit as if no complaint had been filed," are inapplicable until after the dismissal of the SDHR complaint has been effected. N.Y. EXEC. LAW § 297(9) (McKinney 1972). Since the SDHR proceeding was still pending on September 15, 1977, the plaintiff could not rely upon § 297(9) to give effect to the filing of the summons with the court clerk. *But see* note 25 and accompanying text *infra*.

The exclusive nature of the administrative proceedings permitted by § 297 has been emphasized by a number of courts. *See, e.g.,* Kramarsky v. New York City Police Dep't, 90 Misc. 2d 733, 735, 395 N.Y.S.2d 937, 938-39 (Sup. Ct. N.Y. County 1977); Cox v. Carey, 90 Misc. 2d 688, 693, 395 N.Y.S.2d 901, 904 (Sup. Ct. Albany County 1977). It has been held, however, that a simultaneous action in federal court may be brought irrespective of the pendency of an SDHR proceeding. State Div. of Human Rights v. County of Monroe, 88 Misc. 2d 16, 386 N.Y.S.2d 317 (Sup. Ct. Monroe County 1976). After filing an SDHR complaint, the *Monroe* complainant brought a class action in federal court. The state court rejected defendants' contention that the SDHR was divested of jurisdiction by the commencement of a federal action, *id.* at 17, 386 N.Y.S.2d at 319, concluding that "[a]lthough [§ 300] provides an exclusive remedy, it does not prevent the simultaneous commencement of one proceeding before the State Division and another in Federal Court." 88 Misc. 2d at 17, 386 N.Y.S.2d at 319.

¹² 93 Misc. 2d at 222-23, 402 N.Y.S.2d at 162. The SDHR had indicated in its order of dismissal for administrative convenience that "[p]rocessing of complaint could prejudice complainant's right to proceed with his cause of action in any court of appropriate jurisdiction." *Id.* at 220, 402 N.Y.S.2d at 160. The *Cheselka* court observed that the SDHR, through a possible oversight, had "inexplicably [failed to] make its order of dismissal retroactive." *Id.* at 223, 402 N.Y.S. 2d at 162.

¹³ *Id.* at 220, 402 N.Y.S.2d at 160. The plaintiff filed both the summons and complaint with the court clerk on September 15, 1977 in accordance with CPLR 203(b)(5). Service upon the defendant was made on October 31, 1977, within the 60-day requirement of CPLR 203(b)(5). It has been noted by one authority that while the language of CPLR 203(b)(5) may be read so as to permit the tacking of 60 days "to the end of whatever period otherwise remains," the safer interpretation is that the statute only provides an alternative 60 days measured from delivery to the sheriff or the clerk. D. SIEGEL, NEW YORK PRACTICE § 47 (1978). Regardless of which interpretation is correct, the *Cheselka* plaintiff clearly complied with the requirements of the provision.

¹⁴ 93 Misc. 2d at 220, 402 N.Y.S.2d at 160.

dant reasoned that section 297 of the Human Rights Law¹⁵ authorizes an individual either to file a complaint with the SDHR¹⁶ or to commence an action in a court of appropriate jurisdiction¹⁷ within one year of the alleged discriminatory practice.¹⁸ Since administrative proceedings before the SDHR are exclusive while pending,¹⁹ a

¹⁵ N.Y. EXEC. LAW § 297 (McKinney 1972).

¹⁶ Subdivision (1) of § 297 provides, in pertinent part, that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice may . . . file with the division a verified complaint in writing . . . set[ting] forth the particulars [of the alleged discriminatory practice]." The SDHR is authorized "[t]o receive, investigate and pass upon complaints alleging violations of [the statute]"; *id.* § 295(6)(a), and may attempt to eliminate the continuance of unlawful practices by "conference, conciliation and persuasion." *Id.* § 297(3)(a). If the efforts of the SDHR prove fruitless, a hearing may be conducted at which the SDHR is empowered to issue a cease and desist order or to require affirmative action. *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133, 204 N.E.2d 627, 633, 256 N.Y.S.2d 584, 593 (1965).

¹⁷ Section 297(9) states, in part, that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate . . ." N.Y. EXEC. LAW § 297(9) (McKinney Supp. 1977).

¹⁸ The 1-year statute of limitations is set forth in subdivision (5) of § 297 which states: "Any complaint filed pursuant to this section must be so filed within 1 year after the alleged unlawful discriminatory practice." *Id.* § 297(5) (McKinney Supp. 1977). It is well established that the requirement of filing a complaint within one year of the alleged discriminatory act is mandatory. *See State Div. of Human Rights v. Westmoreland Cent. School Dist.*, 56 App. Div. 2d 205, 207, 392 N.Y.S.2d 149, 151 (4th Dep't 1977); *Queensborough Community College v. State Human Rights Appeal Bd.*, 49 App. Div. 2d 766, 766, 372 N.Y.S.2d 722, 723 (2d Dep't 1975) (mem.), *aff'd mem.*, 41 N.Y.2d 926, 363 N.E.2d 349, 394 N.Y.S.2d 625 (1977); *Lanzer v. Fairchild Publications, Inc.*, 46 App. Div. 2d 644, 644, 360 N.Y.S.2d 437, 438 (1st Dep't 1974) (per curiam).

In State Div. of Human Rights v. University of Rochester, 53 App. Div. 2d 1020, 386 N.Y.S.2d 147 (4th Dep't 1976) (mem.), the court emphasized that "[t]he statutory limitation is integral to the right of relief which the statute created. . . . Unless the complainant brings the proceeding within the one-year period, [he] has no cause of action . . ." *Id.* at 1020, 386 N.Y.S.2d at 149 (citations omitted).

When the alleged discriminatory practice consists of a single act, the statute of limitations commences to run as of the date the act was committed. *See, e.g., State Div. of Human Rights v. University of Rochester*, 53 App. Div. 2d 1020, 386 N.Y.S.2d 147 (4th Dep't 1976) (mem.); *Queensborough Community College v. State Human Rights Appeal Bd.*, 49 App. Div. 2d 766, 372 N.Y.S.2d 722 (2d Dep't 1975) (mem.), *aff'd mem.*, 41 N.Y.2d 926, 363 N.E.2d 349, 394 N.Y.S.2d 625 (1977). Where there is a continuing course of discriminatory conduct, however, the statute of limitations will begin to run only after cessation of such practices. *See, e.g., New York City Dep't of Personnel v. New York State Div. of Human Rights*, 56 App. Div. 2d 795, 392 N.Y.S.2d 641 (1st Dep't), *modified on other grounds*, 58 App. Div. 2d 787, 396 N.Y.S.2d 845 (1st Dep't 1977); *State Div. of Human Rights v. Westmoreland Cent. School Dist.*, 56 App. Div. 2d 205, 392 N.Y.S.2d 149 (4th Dep't 1977); *Russell Sage College v. State Div. of Human Rights*, 45 App. Div. 2d 153, 357 N.Y.S.2d 171 (3d Dep't 1974), *aff'd mem.*, 36 N.Y.2d 985, 337 N.E.2d 119, 374 N.Y.S.2d 603 (1975).

¹⁹ N.Y. EXEC. LAW § 300 (McKinney 1972) provides, in part, that the [administrative] procedure . . . shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this

complaint that has been previously filed with the SDHR must be dismissed "on the grounds of administrative convenience" before a court action may be commenced.²⁰ Insofar as the SDHR proceeding had still been pending on September 15, 1977, the defendant contended, a court action could not be commenced as of that date.²¹ Equating the filing of a summons with the court clerk with the commencement of an action, the defendant argued that the filing had been a "nullity" and, therefore, the subsequent service of summons and complaint upon defendant on October 31, 1977 had been untimely.²²

Accepting the defendant's analysis of the interplay of the Human Rights Law and CPLR 203(b)(5), Justice Fraiman, who authored the *Cheselka* court's opinion, added that the filing of a summons with the court clerk has the effect of tolling the statute of limitations because it "constitutes the commencement of the action."²³ Thus, reasoning that the plaintiff had attempted to comm-

article, he may not subsequently resort to the procedure herein.

See *Moran v. Simpson*, 80 Misc. 2d 437, 438-39, 362 N.Y.S.2d 666, 668 (Sup. Ct. Livingston County 1974).

²⁰ Section 297(9) authorizes the bringing of a cause of action in any court of appropriate jurisdiction if no complaint has been previously filed with the SDHR. The section provides, however, that "where the division has dismissed such complaint on the grounds of administrative convenience, [a] person shall maintain all rights to bring suit as if no complaint had been filed." N.Y. EXEC. LAW § 297(9) (McKinney 1972 & Supp. 1977) (emphasis added); see *State Div. of Human Rights v. Commissioner of N.Y. State Dep't of Civil Serv.*, 57 App. Div. 2d 699, 700, 395 N.Y.S.2d 744, 775-76 (4th Dep't 1977).

Section 295(5) of the Human Rights Law gives the SDHR the authority "[t]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith." N.Y. EXEC. LAW § 295(5) (McKinney 1972). Similarly, § 297(4)(d) provides that "[t]he division shall establish rules of practice to govern, expedite and effectuate the . . . procedure [set forth in § 297] and its own actions thereunder." Enacted pursuant to these sections, rule 465.5 states that a complaint may be dismissed on the grounds of administrative convenience "in [the division's] unreviewable discretion at any time prior to the taking of testimony at a public hearing before a hearing examiner." [1977] 9 N.Y.C.R.R. § 465.5(d). Such a dismissal may be predicated upon, *inter alia*, a determination by the SDHR that "holding a hearing will not benefit the complainant [or that] processing the complaint will not advance the State's human rights goals." *Id.* § 465.5(d)(2)(iv) & (v).

²¹ 93 Misc. 2d at 221, 402 N.Y.S.2d at 161.

²² *Id.* at 221, 402 N.Y.S.2d at 161. The plaintiff argued that notwithstanding his inability to commence an action on September 15, 1977 under § 297 of the Human Rights Law, the filing of a summons with the court clerk pursuant to CPLR 203(b)(5) had nevertheless served to toll the statute of limitations. The plaintiff reasoned that his filing of the summons with the court clerk had operated merely to interpose his claim and thereby preserve his action from the time bar. According to the plaintiff's theory, the action was commenced only when the summons had been "served upon the defendant within sixty days after the period of limitations would have expired but for [CPLR 203(b)(5)]." 93 Misc. 2d at 222, 402 N.Y.S.2d at 161 (quoting CPLR 203(b)(5)).

²³ *Id.* at 222, 402 N.Y.S.2d at 161. Justice Fraiman apparently felt that since a pending administrative proceeding was the "exclusive" remedy available to plaintiff, see N.Y. EXEC.

LAW § 300 (McKinney 1972), it would be inconsistent with such provision to allow a plaintiff to interpose his claim by filing of a summons with the court clerk. It is suggested, however, that this approach is inconsistent with the purposes of CPLR 203(b)(5). See note 25 *infra*. There appears to be no language in either statute which precludes contemporaneous application of both statutes. A useful analogy in this regard may be drawn to the interplay between the 1-year and 90-day limitation period prescribed in § 50-i of the General Municipal Law, N.Y. GEN. MUN. LAW § 50-i (McKinney 1977) and CPLR 203(b)(5). Application of CPLR 203(b)(5) has been held to be consistent with the limitation period contained in the General Municipal Law. Thus, service upon the defendant need not occur within the prescribed 1-year and 90-day period if after filing of a summons with the sheriff or clerk, service upon the defendant occurs within the additional 60 days provided by CPLR 203(b)(5). See, e.g., *Clough v. Board of Educ.*, 56 App. Div. 2d 233, 235, 392 N.Y.S.2d 170, 172-73 (4th Dep't 1977); *Cyens v. Town of Roxbury*, 40 App. Div. 2d 915, 915, 337 N.Y.S.2d 732, 733 (3d Dep't 1972) (mem.).

The plaintiff in *Clough* had filed a summons with the sheriff within the 1-year and 90-day statute of limitations set forth in the General Municipal Law. Actual service of process upon the defendant, however, occurred after the running of the limitations period but within the 60 days provided by CPLR 203(b)(5). The difficulty facing the court was reconciling § 203(b)(5) with the express language of § 50-i(2) of the General Municipal Law which states that the limitation provision "shall be applicable notwithstanding any inconsistent provisions of law, general, special or local." 56 App. Div. 2d at 234-35, 392 N.Y.S.2d at 172. Equating commencement of an action with interposition of a claim, the *Clough* court concluded that 203(b)(5) was not "inconsistent" with § 50-i since the former merely prescribes the time-calculation methods for a plaintiff who wishes to commence an action by filing with the sheriff within the 1-year and 90-day period. The court's rationale, however, may be criticized on a number of grounds. Primarily, in reaching its determination, the court avoided a seemingly clear statutory mandate that the statute of limitations of § 50-i supersede all prior and inconsistent provisions or time limitations. Notwithstanding the court's attempt to reconcile the language of CPLR 203(b)(5) with the intent underlying § 50-i, the net effect of applying § 203(b)(5) was a 60-day extension of the statute of limitations, a result contrary to the expressed legislative intent.

Furthermore, the *Clough* court's conclusion that "the commencement of the action is equivalent to the interposition of the claim," 56 App. Div. 2d at 235, 392 N.Y.S.2d at 172 (citing *Zeitler v. City of Rochester*, 32 App. Div. 2d 728, 302 N.Y.S.2d 207 (4th Dep't 1969) (mem.)), is open to criticism. From a logical standpoint alone, were interposition of a claim equivalent to commencement of an action, there would have been no need to create a dichotomy in terms between interposition and commencement. It may be argued that in creating the notion of interposition of a claim, the legislature clearly contemplated a concept distinct from that of commencement. The legislative history of CPLR 203(b) supports such a conclusion. See note 25 *infra*. Use of the term "interposition of a claim" otherwise fosters only ambiguity.

The *Clough* court's reliance on *Zeitler v. City of Rochester* for the proposition that interposition is equivalent to commencement appears to be misplaced. Nowhere in the *Zeitler* opinion does the court attempt to equate interposition and commencement. In addressing the question whether application of § 203(b) is inconsistent with the time strictures imposed by § 50-i of the General Municipal Law, the *Zeitler* court noted that the enactment of § 50-i was intended, "[f]or purposes of clarity and uniformity," to preclude application of various statutory provisions which had previously resulted in time limitations of varying lengths. Thus, "statutory stays pursuant to CPLR 204(a) . . . applied by the courts in actions involving claims of municipal liability for tort [were] eliminated by . . . section 50-i . . ." 32 App. Div. 2d at 729, 302 N.Y.S.2d at 209. Relying upon this view of the purpose of § 50-i, the *Zeitler* panel found "no legislative intent . . . that . . . section 50-i [renders] inoperative the ameliorative provision of CPLR 203(b)." 32 App. Div. 2d at 729, 302 N.Y.S.2d at 209. The possibility of equivalence of interposition of a claim under CPLR 203(b) and the commencement of an action was never considered by the *Zeitler* court.

ence an action by filing, and that the exclusivity provision of the Human Rights Law made the filing a nullity, the court concluded that the "plaintiff, by voluntarily discontinuing the administrative proceeding, [had] deprived himself of his day in court."²⁴

It is submitted that the *Cheselka* court failed to recognize the distinction, seemingly advanced in CPLR 203(a), between commencement of an action and interposition of a claim.²⁵ Rather than

²⁴ 93 Misc. 2d at 223, 402 N.Y.S. 2d at 162. Noting the exclusivity of an SDHR proceeding, the court refused to recognize that the plaintiff could file with the clerk while the administrative proceeding was still pending. With respect to § 297(9), which provides that following a dismissal for administrative convenience a plaintiff's "rights to bring suit [exist] as if no [administrative] complaint had been filed," N.Y. EXEC. LAW § 297(9) (McKinney 1972), the court reasoned that while the provision may serve to protect plaintiff's right to sue, it "does not provide him with an extension of time." 93 Misc. 2d at 221, 402 N.Y.S.2d at 161 (quoting *Popp v. Pan American World Airways, Inc.*, N.Y.L.J., December 20, 1977, at 5, col. 1 (Sup. Ct. N.Y. County)). The plaintiff in *Popp* had filed a complaint under the Human Rights Law, alleging that he had been discharged from his employment because of his age. He wished to pursue his cause of action in state court and therefore obtained dismissal of the SDHR proceeding on the grounds of administrative convenience. *Id.* The *Popp* court granted the defendant's motion to dismiss the action as untimely, holding the requirement of § 297(5), that an action be commenced within one year, was not tolled by plaintiff's request for dismissal of the SDHR proceeding. *Id.* at 5, col. 3.

²⁵ An examination of the legislative history of CPLR 203 indicates that the legislature, in using the phrase "a claim . . . is interposed," was attempting to introduce a concept separate and distinct from that of commencement. CPLR 203(b) was derived from §§ 17 & 18 of the Civil Practice Act which dealt with *attempts* to commence an action. Section 17 provided that "[a]n attempt to commence an action . . . is equivalent to the commencement thereof against each defendant, *within the meaning of each provision of this act which limits the time for commencing an action*, when the summons is delivered . . . to the sheriff . . ." SECOND REP. at 500 (emphasis added). The comment following both §§ 17 & 18 states that "[u]nder both sections, the delivery of the summons for service to the proper officer . . . operates to extend the time for the *commencement of an action* for a given period." SECOND REP. at 500-01 (emphasis added).

The predecessor of subsection (a) of CPLR 203 is former § 11 of the Civil Practice Act, entitled "Mode of computing periods of limitation." The Second Report states that under § 11 "the two termini for computing a period of limitation [were]: (a) 'the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires'; and (b) 'the time when the claim to that relief is actually *interposed*.'" SECOND REP. at 492 (emphasis added). The Report goes on to describe the time when a claim "is 'actually interposed' as the time when an action is commenced, that is, *when the summons is served upon the defendant* . . ." *Id.* at 493 (quoting former § 16 of the Civil Practice Act) (emphasis added).

In light of the history of CPLR 203, it appears that the intent of the legislature was to create the concept of "interposition" of a claim as distinct from that of commencement of an action by providing that the applicable time limitation could be complied with by fulfilling certain filing requirements short of personal service. The express language of § 17 reveals that any "equivalence" between the two concepts exists only for purposes of any provision which "limits the time for commencing an action." Such an interpretation explains, to some extent, the court's language in *Clough v. Board of Educ.*, 56 App. Div. 2d 233, 392 N.Y.S.2d 170 (4th Dep't 1977); see note 14 *supra*. The *Clough* court's conclusion that the "commencement of the action [was] equivalent to the interposition of the claim," 56 App. Div. 2d at 235, 392 N.Y.S.2d at 172, under the facts of that case, did not cause a result inconsistent with the

recognize the interposition of a claim pursuant to CPLR 203(b)(5) as a separate and distinct concept, the *Cheselka* court determined that filing with the clerk constituted commencement of the action with the condition subsequent that service of summons and complaint upon the defendant be effected within 60 days.²⁶ CPLR 203(b)(5), however, should be viewed as providing a mechanism for tolling applicable statutes of limitations. Under the court's approach, where a complaint is pending before the SDHR and the 1-year limitation is near, a plaintiff who wishes to preserve the availability of a court action must, at that point, choose his remedy, since the statute of limitations cannot be tolled. The provisions of CPLR 203(b)(5) do not aid the plaintiff in such a case because the exclusivity provision of the Human Rights Law acts as an impediment to the commencement of an action by filing with the clerk.²⁷

The interplay of the various procedural requirements of the Human Rights Law reveals the importance of the limitation period in the overall scheme of relief afforded by section 297.²⁸ Satisfaction

legislative history of CPLR 203(b). The *Clough* plaintiff was faced with a potential time bar to his cause of action imposed by § 50-i of the General Municipal Law, a provision which limits the time for commencing an action. Thus, viewing interposing of the claim as the equivalent of commencing the action still effectuates the intent of the provision. In contrast, while the *Cheselka* court conceivably could view interposition of the claim to be equivalent to commencement of the action for purposes of the 1-year statute of limitations, there is no authority in the express language or legislative history of either CPLR 203(b) or its predecessors to require that interposition and commencement be deemed equivalent for any other purposes, specifically for purposes of the prohibition against simultaneous maintenance of an SDHR proceeding and commencement of a court action.

The language initially proposed for CPLR 203 appears in Article 5 of the 1958 Tentative Draft. Section 5.3(b) provided that:

A claim asserted in the complaint is interposed *and the action is commenced* when

. . . .

3. the summons is delivered for service to a sheriff or other officer . . . , if service of the summons is completed within sixty days after the period of limitation would have expired but for this provision.

SECOND REP. at 46-47 (emphasis added). CPLR 203(b) as enacted did not contain the words "and the action is commenced." On the basis of legislative comment indicating that only minor language changes were made, *see* SIXTH REP. at 71-72, and that the section remained "substantially unchanged," *see* FIFTH REP. at 31-33, it is conceivable that the omission of the language could have been intended merely to avoid redundancy were interposition of a claim deemed to be identical with commencement of an action. The predecessors of CPLR 203(b), §§ 17 & 18 of the Civil Practice Act and the comment following those sections, however, belie such a conclusion. SECOND REP. at 500-03.

²⁶ *See* note 23 and accompanying text *supra*.

²⁷ *See* notes 19-20 and accompanying text *supra*.

²⁸ *See* State Div. of Human Rights v. Westmoreland Cent. School Dist., 56 App. Div. 2d 205, 392 N.Y.S.2d 149 (4th Dep't 1977); State Div. of Human Rights v. SUNY, Upstate Medical Center, 53 App. Div. 2d 1062, 386 N.Y.S.2d 139 (4th Dep't 1976) (mem.); State Div. of Human Rights v. University of Rochester, 53 App. Div. 2d 1020, 386 N.Y.S.2d 147 (4th Dep't 1976) (mem.); Queensborough Community College v. State Human Rights Appeal Bd.,

of the 1-year statute of limitations is an inherent element of the cause of action.²⁹ It is clear that strong policy considerations underlie the strict application of the limitations period and the prohibition against simultaneous maintenance of administrative and judicial proceedings.³⁰ A savings of both administrative and judicial time would have resulted, however, from permitting the plaintiff in *Cheselka* to maintain his suit, rather than requiring him to seek SDHR revision of its order of dismissal and thereafter commence another court action.³¹ While the *Cheselka* court expressed reluctance in dismissing plaintiff's complaint "purely on a technicality,"³² it is suggested that the court's determination was not necessitated either by policy considerations present in the Human Rights Law or by the mandatory nature of the 1-year limitation period.³³

In light of *Cheselka*, the practitioner must be alert to the danger that an aggrieved party may lose the opportunity to litigate his claim of discriminatory practices should he withdraw a pending complaint within the division near the end of the 1-year limitation period. Under the court's interpretation of CPLR 203(b)(5), should the effective date of the SDHR's dismissal be more than 1 year after the alleged discriminatory practice, a subsequent action will be time barred, notwithstanding that filing with the clerk in compliance with 203(b)(5) was effectuated prior to expiration of the limitation period.

Denise M. Tormey

49 App. Div. 2d 766, 372 N.Y.S.2d 722 (2d Dep't 1975) (mem.), *aff'd mem.*, 41 N.Y.2d 926, 363 N.E.2d 349, 394 N.Y.S.2d 625 (1977); *Lanzer v. Fairchild Publications, Inc.*, 46 App. Div. 2d 644, 360 N.Y.S.2d 437 (1st Dep't 1974) (per curiam).

²⁹ See note 18 *supra*.

³⁰ The need to prevent incongruous determinations by the court and the SDHR on the same set of facts necessitates the type of exclusivity provision included in the Human Rights Law. The requirement that an administrative proceeding be exclusive while pending precludes the possibility of a divergent outcome since no intervening adjudication can take place. Similarly, once a court action is commenced, a complainant may not thereafter seek administrative relief from the SDHR. N.Y. EXEC. LAW § 297(9) (McKinney 1972).

³¹ It is suggested that the *Cheselka* court could have categorized the plaintiff's filing with the court clerk as commencement of the action solely for purposes of complying with the statute of limitations. This approach would be consistent with CPLR 203(a) which states that "[t]he time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is interposed." Once the administrative proceeding had been dismissed, the plaintiff could commence his action for all other purposes by personally serving the defendant.

³² 93 Misc. 2d at 222, 402 N.Y.S.2d at 162.

³³ The primary purpose underlying the creation of statutes of limitation is "to afford security against stale demands when the circumstances, by reason of the obscuring effects of time, would be unfavorable to a just examination and decision." 2 CARMODY-WAIT 2d § 13:1 (1965); see *Vastola v. Maer*, 48 App. Div. 2d 561, 564, 370 N.Y.S.2d 955, 958 (2d Dep't 1975), *aff'd mem.*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S.2d 246 (1976).